82-519

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

JOSEPH P. COUNIHAN, JR., As Temporary Administrator of the Estate of ANNE FAHEY COUNIHAN, Deceased, et al,

APPELLANTS,

Vs.

DEPARTMENT OF TRANSPORTATION OF GEORGIA; CHATHAM COUNTY COMMISSIONERS; JOE E. LAMBRIGHT, Individually and as Chatham County Administrator; HUDSON WISE, Individually and as Administrator of Chatham County Public Works; and AL ST. LAWRENCE, Individually and as Chief of Chatham County Police,

APPELLEES.

CASE NUMBER 82-519

MOTION TO DISMISS OR TO AFFIRM

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Appellants,	)	
-v-	)	CASE NO. 82-519
DEPARTMENT OF TRANSPORTATION OF GEORGIA; CHATHAM COUNTY COMMISSIONERS; JOE E. LAMBRIGHT, Individually and as Chatham County Administrator; HUDSON WISE, Individually and as Administrator of Chatham County Public Works; and AL ST. LAWRENCE, Individually and as Chief of Chatham County Police,	)	
Appellees.	)	

ON APPEAL FROM THE
COURT OF APPEALS OF GEORGIA

MOTION TO DISMISS OR TO AFFIRM

The Chatham County Commissioners, Joe E. Lambright, Hudson Wise and Al St. Lawrence, named as Appellees herein, respectfully move the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Court of Appeals of Georgia, on which judgment the Supreme Court of Georgia denied a Writ of Certiorari, on the grounds that this appeal does not raise a substantial federal question; and that the judgment in this case rests upon an adequate and valid State basis.

QUESTIONS PRESENTED

1.

Whether Appellant's appeal presents a substantial federal question.

2.

Whether the judgment appealed from rests on an adequate and valid State basis.

STATEMENT OF THE CASE

Appellant attacks the constitutionality of two Georgia statutes on the grounds that they allegedly deny due process of law and equal protection of the law guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution and Article II, Sections I and II of the Constitution of the State of Georgia of 1976. (Ga. Code Ann. Sections 2-101 and 2-203). The statutes under attack (Ga. Laws 1973, pp. 947, 983, as amended [Ga. Code Ann. §§ 95A-304 and 95A-305]) relate to the ability of the change and other State governmental bodies to bring suits and be sued in such actions as are permitted by law. These statutes further provide that the Department of Transportation shall defend certain actions including those which are brought against counties of the State of Georgia on causes of action arising upon public roads which are part of the State Highway System.

Appellant claims that these statutes are unconstitutional in light of another statute of this State which provides for the liability of municipalities negligent in the performance of their ministerial duties. (Ga. Code § 69-301).

A concise statement of facts is as follows: Appellant brought suit against the Department of Transportation, Chatham County, Georgia, and individual employees of Chatham County seeking damages for the alleged wrongful death of Appellant's decedent. Appellant alleged that the decedent lost control of her vehicle on an allegedly icy bridge, and that this condition was the result of the negligence of the various Appellees herein.

Chatham County and Joe E. Lambright, Chatham County Administrator,

Hudson Wise, Administrator of Chatham County Public Works and Al St. Lawrence, Chief of Chatham County Police, filed a Motion to Dismiss the wrongful death action against it on the ground that it was immune from this suit under the doctrine of sovereign immunity. This Motion was unopposed. Appellant, on appeal, sought to defend against this immunity by contending that Georgia Code Annotated Sections 95A-304 and 95A-305 amounted to a waiver of the appellee's sovereign immunity and that these sections expressly authorized the action sub judice.

The decision of the Georgia Court of Appeals, refuted Appellant's assertion that these statutes amounted to a waiver of sovereign immunity.

A. THE APPEAL DOES NOT PRESENT THIS COURT WITH A SUBSTANTIAL FEDERAL QUESTION.

Under the Georgia Constitution and statutory provisions a County is immune from suit unless there is an express legislative waiver of this immunity. Code Sections 2-3401, 23-1502. The pleading against the County must show a statute which authorizes Plaintiff to bring the suit. "While it is true that a suit may now be maintained against a county in certain instances, still this cannot be done except when it is authorized by express statutory or constitutional provision; and it is incumbent upon the person filing the suit to show that his cause is within the legislative authority permitting such suit." Ayers v. Franklin County, 73 Ga. App. 207 (2) (36 SE2d 110).

From our adversary's brief it appears the statute relied upon by them is codified as § 95A-305(a). Their reliance is misplaced because this statute obviously was enacted only to require the Department of Transportation to defend and assume liability when a county is sued for a cause of action occuring on a road which is a part of the State Highway System. It is not a legislative waiver of sovereign immunity.

In fact, the Georgia Supreme Court specifically held in Revels

vs. Tift County, 235 Ga. 333 (219 SE2d 445) that sovereign immunity applies as to counties sued for alleged negligence and that Georgia Code § 23-1502 providing that "A county is not liable to suit for any cause of action unless made so by statute does not violate State or Federal Constitutions." In accord are DeKalb County vs. Dixion, 146 Ga. App. 573 (246 SE2d 692) and Mires vs. United States of America, 242 Ga. 126 (249 SE2d 573).

In Beers v. State of Arkansas, 61 U.S. 527 (1857), Mr. Justice Taney stated:

> "It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission; but it may, if it thinks proper, waive this privilege, and permit itself to be made a defendant in an suit by individuals, or by another State. And as this permission is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it." Beers v. State of Arkansas, 61 U.S. 527 at p. 529.

It is submitted that Georgia, by enacting Georgia Code Annotated Sections 95A-304 and 95A-305, has done precisely what this Court was considering in the above-quoted language from Beers, supra. Georgia Code Annotated Section 95A-304 provides that the Department of Transportation may be sued in "such actions as are permitted by law."

This Court has held that such matters are strictly within the purview of state law and do not require the intervention or scrutiny of this Court. In Palmer v. State of Ohio, 248 U.S. 42 (1918), this Court was called upon to construe the following language of the Ohio Constitu-

tion:

"Suits may be brought against the State in such Courts and in such manner as may be provided by law." Compare with Ga. Const., Art. IV, Sec. V, Par. I (Ga. Code Ann. §2-3401) and Ga. Laws 1973, pp. 947, 983, as amended (Ga. Code Ann. §95A-304).

In Palmer, supra, this Court held as follows:

"The State Supreme Court held that this amendment is not self-executing, and that the General Assembly of the State having failed to designate the Courts and the manner in which such suits might be brought, effective consent to sue had not been given. This decision, the plaintiffs in error claim, vaguely and indefinitely, somehow deprives them of their property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States."

"The right of individuals to sue a State, in either a federal or state court, cannot be derived from the Constitution or laws of the United States. It can come only from the consent of the State. Beers v. Arkansas, 20 How. 527; Railroad Company v. Tennessee, 101 U.S. 337; Hans v. Louisiana, 134 U.S. 1.

"The further claim that the plaintiffs in error are deprived of their property without compensation in violation of the Fifth Amendment to the Constitution of the United States, is palpably groundless. Barron v. Baltimore, 7 Pet. 243, 250; Brown v. New Jersey, 175 U.S. 172, 174.

"No federal question being presented by the record, the motion to affirm is denied and this court, sua

sponte, dismisses the writ of error for want of jurisdiction." Palmer v. State of Ohio, 248 U.S. 32, at pp. 33 and 34.

Because the grant or denial of permission to sue the sovereign is a matter which addresses itself purely to the legislative grace of the State, no federal question arises. This privilege, when conferred, does not arise under the Constitution or laws of the United States, and neither does denial of this privilege. This being a matter of legislative grace, no denial of due process of law can exist, there being no federal rights to be protected.

Because of the vast distinction between municipal corporations and the sovereign, there can be no denial of equal protection by permitting limited suits against municipalities which are not permitted against the sovereign itself. Georgia Code Section 69-301 is not more than a codification of common law principles laid down in Georgia. Collins v. The Mayor and C. of Macon, 69 Ga. 542 (1882); Rivers v. City Council of Augusta, 65 Ga. 376 (1880). Georgia has never recognized a limited liability for the State or counties similar to that of municipalities contained in Georgia Code Section 69-301.

It is clear that the legislature may withhold permission to sue the State or its agencies, this being a mere privilege, with no attendant denial of equal protection of the law. See Beers v. State of Arkansas, 61 U.S. 527, 529 (1857).

B. THE JUDGMENT APPEALED FROM RESTS UPON AN ADEQUATE AND VALID STATE BASIS.

Once again we reiterate that:

"The right of individuals to sue a State, in either a federal or state court cannot be derived from the Constitution or laws of the United States. It can come only from the consent of the State. Beers v. Arkansas, 20 How. 527 (61 U.S. 527)(1857);

Railroad Company v. Tennessee, 101 U.S. 337; Hans v. Louisiana, 134 U.S. 1. Whether Ohio gave the required consent must be determined by the construction given to the constitutional amendment quoted, and this is a question of local state law....no federal right being involved." Palmer v. Ohio, 248 U.S. 32 at P. 34. (Emphasis added).

Such authority affirms that the rulings of the Georgia trial and appellant Courts rest upon an adequate and valid State basis.

CONCLUSION

It is urged that the Appellant's appeal in this case, both as to the constitutionality of the Georgia statutes and as to Appellant's intent to invalidate soverein immunity in Georgia, be held to be without merit.

Respectfully submitted this 25th day of October, 1982.

CHATHAM COUNTY

Fred S. Clark

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CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for the opposing party in the foregoing matter, pursuant to Rule 28(c) of the Rules of the Supreme Court of the United States, and counsel for all other parties, with copies of "Motion to Dismiss or to Affirm" by depositing same in the United States Mail with sufficient postage for first class delivery in envelopes properly addressed to:

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This 15th day of October, 1982.

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